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No. 01-805

In The

Supreme Court of the United States

GEORGE ERVIN FOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Child Pornography Prevention Act of 1996 prohibits, in relevant part, the receipt . . . or . . . possession of any visual depiction that "appears to be of a minor engaging in sexually explicit conduct." 18 U.S. Code Section 2255A; 2256(8)(B) Do these prohibitions violate the First Amendment?

2. Whether the Act's "appears to be" language [18 U.S. Code Section 2255A; 2256(8)(B)] lessens the Government's burden of proof in violation of the Due Process Clause of the Fifth Amendment?

3. Whether and when can the age of a model in a child pornography prosecution be determined by a lay person without the assistance of expert testimony?

4. What constitutes a "lascivious exhibition" under the Child Pornography Prevention Act, 18 U.S. Code Section 2256(2)(E)?

5. Whether Rules 402 and 403 of the Federal Rules of Evidence require that photographs or visual depictions satisfy the definition of "child pornography" (18 U.S. Code Section 2256 – under the age of 18 and sexually explicit conduct) before being admitted into evidence?

6. What procedural safeguards should the district court adopt in a child pornography prosecution to ensure the accused the right of a fair trial?

LIST OF PARTIES

Petitioner, George Ervin Fox, was a resident of Vidor, Texas. The United States Government is the other interested party.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner GEORGE ERVIN FOX petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit and shows as follows:

OPINIONS BELOW

The opinions of the Court of Appeals (App. B.) is reported at 248 F.3d 394. The opinion of the district court is reported at 74 F. Supp. 2d 696 (App. C.).

JURISDICTION

The judgment of the Court of appeals was entered on April 13, 2001. A petition for rehearing was denied on May 21, 2001. The jurisdiction of this Court is invoked under 28 U.S. Code § 1254(1). Petitioner requests that the Rule be waived if necessary.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech." The Fifth Amendment to the Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty or property without due process of law. . . . " This case also involves in relevant part the following provisions of the

Child Pornography Prevention Act (18 U.S. Code §§ 2252, et seq.): 18 U.S. Code § 2252A, and 18 U.S. Code § 2256. These provisions are reprinted in Appendix D. Rules 401, 403, and 702 of the Federal Rules of Evidence are reprinted in pertinent part in Appendix G.

STATEMENT OF THE CASE

This case involves the constitutionality and proper construction of the Child Pornography Prevention Act of 1996 as well as interpretation of the Federal Rules of Evidence. The Government charged George Ervin Fox Jr. with the offense of knowingly receiving child pornography by computer. Fox moved to dismiss the indictment alleging that the statute upon which prosecution was based was unconstitutional because it prohibited protected expression under the First Amendment as well as being vague and overbroad. The district court denied the motion to dismiss and rendered a memorandum opinion explaining its reasons. See 74 F. Supp. 2d 696. At the trial of the case, the Government introduced photographs, or images made from Fox's computer drive. The defense objected to the admission of the photographs or visual depictions on the basis that no preliminary showing was made that the photos depict a minor or someone who appears to be a minor and such admission will cause prejudice which far outweighs any probative value of the exhibits. Also, no expert testimony was introduced by the Government as to the ages of the alleged minors. The district court overruled these objections. The defense reargued the same objections when the Government projected the photographs in a slide show upon a four foot

by four foot screen to give the jury a better view of the evidence. The district court again overruled these objections. At the conclusion of the Government's case and then at the conclusion of Fox's case, the defense both times moved for an instructed verdict on the basis that the evidence as to all of the elements of the offense was insufficient to sustain a conviction. The district court denied these motions by written order. After deliberations, the jury found Fox guilty as charged. The district court sentenced Fox to forty-six (46) months imprisonment, a $5000.00 fine and a $100.00 assessment.

Fox appealed to the United States Court of Appeals for the Fifth Circuit. After hearing oral argument, the Fifth Circuit affirmed Fox's conviction and sentence. See 248 F.3d 394. The Fifth Circuit held that with respect to Fox's conviction: (1) the extension of the prohibition on child pornography to visual depictions that "appear to be" or "convey the impression of" minors engaging in sexual conduct did not violate Fox's rights protected by the First Amendment; (2) the statute was not unconstitutionally overbroad or vague; (3) the evidence was sufficient to sustain conviction; (4) expert testimony was not required regarding the age of subjects depicted in the images; and (5) probative value of the images was not substantially outweighed by unfair prejudice. See Appendix B. Petitioner filed a motion for rehearing which was denied by the court of appeals. Appendix A.

REASONS FOR GRANTING WRIT

1. This Court has granted certiorari in another case involving issue 1 but not yet addressed it in the context of a federal criminal case.

The Court has already granted certiorari in another case involving the same question as in question number 1. See *Ashcroft, Attorney General v. Free Speech Coalition, et al.*, No. 00-795 (U.S. Supreme Court, petition granted Jan. 22, 2001). However, Free Speech Coalition actually is a civil case seeking injunction against enforcement under the Child Pornography Prevention Act. This case involves a criminal prosecution under the same Act. Even though both cases address the same issue, the Court should grant certiorari to address the matter in a different context: the context of a federal criminal case. The Court should grant oral argument in both cases on the same day even though this case has other important issues that should be decided by this Court.

2. The Court of Appeals and other federal courts have given the Child Pornography Prevention Act an unwarranted construction in order to save its constitutionality.

Where the decision below holds a federal statute unconstitutional or where a federal statute is given an unwarranted construction in order to save its constitutionality certiorari is usually granted because of the obvious importance of the case. See *United States v. Butler*, 297 U.S. 1 (1936); *United States v. Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an act of Congress").

In this case, the Court of Appeals, as did Courts of Appeal in three other circuits, construed the 1996 Child Pornography Prevention Act in such a way to preserve its constitutionality. See *Fox*, 248 F.3d at 396; *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999); *United States v. Acheson*, 195 F.2d 645 (11th Cir. 1999); *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000). However, what these courts did was to violate the accepted principles of statutory construction in order to protect the Act's validity. In *Hilton*, the Court of Appeals for the First Circuit held that Act was not unconstitutionally overbroad. 167 F.3d at 74. The court of appeals first went to the statutory language. But admitted that on its face, the statute was constitutionally troublesome. 167 F.3d at 71. Then, the appellate court went to the legislative record and concluded that "drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses plainly lie beyond the reach of the Act." 167 F.3d at 652 ("the legitimate scope of the statute dwarfs the risk of impermissible applications".) The Fourth Circuit in *Mento* followed the First Circuit and the Eleventh Circuit in *Acheson*. The Fifth Circuit in turn relied heavily on its sister circuits in holding that the statute was neither vague nor overbroad. *Fox*, 248 F.3d at 396.

Petitioner asserts that the courts in the *Hilton*, *Acheson*, *Mento*, and *Fox* decisions have given the Act an unwarranted construction in order to save its constitutionality. Each of these courts disregarded some fundamental rules of statutory construction. First, in construing a statute, a court begins with the language of the statute. *Williams v. Taylor*, ___ U.S. ___, 120 S.Ct. 1479, 146 L. Ed. 2d 435 (2000); *Howe v. Smith*, 452 U.S. 473, 480 (1981). In

other words, to put it more aptly, "Congress says in a statute what it means and means in a statute what it says there". *Hartford Underwriters Ins. Co. v. Union Planters Bank N.A.*, ___ U.S. ___, 120 S.Ct. 1942, 147 L. Ed. 2d ___ (2000). The legislative intent of Congress is to be derived from the language of the statute itself, if possible, not from the assertions of codifiers directly at odds with clear statutory language. *United States v. Lanier*, 520 U.S. 259, 267 n. 6 (1997). Also, it is a general rule of construction that the courts have no authority to create and will not create, exceptions to the provisions of the statute not made by the act itself. *Bull v. United States*, 295 U.S. 249 (1933).

A critical examination of the *Hilton, Acheson, Mento, and Fox* decisions shows that the lower federal courts have disregarded the plain language of the statute itself and have incorrectly inferred congressional intent to save the statute from its own patent unconstitutionality. The express language of the Act creates broad prohibitions against different types of visual depictions, including ("any photograph, film, video, *picture*, or computer or computer-generated image or *picture, whether made or produced bar electronic, mechanical*, or other means . . . ") (emphasis added) Congress found " . . . new photographic and computer imaging technologies make it possible to produce . . . visual depictions . . . that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct; . . . " P. L. 104-208, § 121, subsection 1(5). The Senate in enacting S. 1237, explicitly stated that the "appears to be" language "applies to the same type of photographic images already

prohibited, but does not require the use of an actual minor in its production." See *Hilton*, 167 F.3d at 72. From the legislative history, the Court of Appeals in *Hilton* inferred that Congress' intent to extend federal authority was limited and appropriately tailored to achieve narrow results. *Id.* The Court of Appeals further held that the Act was not unduly vague. 167 F.3d at 75. The "appears to be a minor" was an objective, not a subjective standard. "A jury must decide based on the totality of the circumstances, whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity." *Id.*

However, the Court of Appeals in *Hilton* misconstrued the statute and the relevant legislative history of the Act. From both the language of the Act and the legislative history, Congress clearly intended a broad application of the Act for the express purpose of "the elimination of and the protection of children from sexual exploitation." P. L. 104-208, § 121, subsection 1(13). Congress created no affirmative defense where such visual depiction was for a literary, artistic, political, educational, or scientific purpose. 18 U.S. Code § 2252A. Congress must have been aware that many states including Texas deem such purposes as justifications precluding criminal liability. See, e.g., § 43.23 Tex. Penal Code. Nevertheless, Congress chose not to create such a defense. The Court of Appeals in *Hilton* erred in recognizing such an exception in holding that the Act was not unconstitutionally overbroad.

Petitioner remains mindful of the rule that when a federal court is dealing with a federal statute challenged

as overbroad under the First Amendment, it should construe the statute to avoid constitutional problems if the statute is subject to such a limiting construction, *New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982). If the federal statute is not subject to a narrowing construction and is impermissibly overbroad, only the unconstitutional portion is to be invalidated if it is severable. *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971).

The problem is that the objectionable portions of the statute are contained in the definition of "child pornography". 18 U.S. Code § 2256. Contrast this situation with the one which faced this Court in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). The statute in that case contained two separate prohibitions, one against obscene commercial telephone message; the other against indecent messages. This Court held that the ban against the obscene messages was not unconstitutional; however, the ban against indecent messages was struck down. These prohibitions were easily severable from each other even though severability was not before the Court. 492 U.S. at 124. It would be impractical to sever one part of the child pornography definition from the other. It would be like "King Solomon cutting the baby in half." In this case, severability is not an option.

The statute because of its expansive definition of "child pornography" covers a substantial amount of conduct protected by the First Amendment. Nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment. *Alexander v. United States*, 509 U.S. 544, 549-550 (1993). This Court has recognized that depictions of nudity, without more, constitute protected expression under the First Amendment.

New York v. Ferber, 458 U.S. at 765 n. 18. The use of a youthful looking adult model in depicting minors performing sexual acts for literary or artistic reasons may be constitutionally protected as well. *Ferber*, 458 U.S. at 763. Petitioner submits that the Ninth Circuit's holding that the statutory language is vague and overbroad and does not meet the requirements of the First Amendment should be adopted by this Court. *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1092 (9th Cir. 1999), cert. granted.

The Ninth Circuit correctly held that by criminalizing all visual depictions that "appear to be" or "convey the impression" of child pornography, even where no child is ever used or harmed in its production, Congress outlawed depictions constituting expression protected by the First Amendment. See 198 F.3d at 1094. The Act attempts to criminalize "impulses of the mind, manifested in illicit creative acts". *Id.* The Act's attempt to stamp out child pornography from American minds has created our own version of an Orwellian "thought-crime". The Constitution protects the right to receive information and ideas regardless of their social worth. This right is fundamental to our society. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds". 394 U.S. at 565.

The Courts of Appeals' determination that "drawings, cartoons, sculptures and paintings . . . plainly lie beyond the reach of the Act" conflicts with the plain language of the statute. Compare *United States v. Fox*, 248 F.3d 394, 396 (2001) and *Hilton*, 167 F.3d at 65 with 18 U.S. Code Section 2252A.

The "appears to be a minor" standard is not only vague; it is confusing. Appears to whom? The term "appears to the reasonable unsuspecting viewer" does not exist in the text of the statute. This standard was created through the guise of "judicial interpretation". See *Hilton*, 167 F.3d at 75. This application of the rule approaches the boundary between the exercise of judicial power and that of legislative power as to call for great caution and circumspection in order to avoid "judicial legislation". Close examination of the specificity of the statutory limitation is required where as here, the legislation is permeated by First Amendment interests. *Buckley v. Valeo*, 424 U.S. 1, 40-41 (1976) If the model "appears to be a minor", her real age does not matter for the purpose of prosecution. Is she 17 or 18? The vagueness of such a content-based regulation coupled with its deterrent effect as a criminal statute raise special First Amendment concerns because of its obvious chilling effect on free speech. See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870-874 (1997)

Appendix F of this Petition (App. 49-57) shows actual instances where prosecutors applied child pornography statutes to serious artistic works. Concern over this Act (CPPA) in fact left the new film version of *Lolita* without a U.S. distributor for over a year. (App. 49) The CPPA has no exemption for artistic or literary works. The *Lolita* episode together with the *TinDrum and Barnes and Noble cases* present compelling evidence of a chilling effect on the exercise of First Amendment rights. What about the recent movies like *American Beauty* where a majority actress portrayed a nude minor in sexual fantasies of an older man? What about *American Pie*, where an actress

portrayed a mostly nude female adolescent engaged in masturbation? Does the CPPA apply to them? Does the Act lend itself to selective prosecution?

Also, the CPPA's breadth suppresses a large amount of constitutionally protected expression. This burden is unacceptable if less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes. See *Sable*, 492 U.S. at 126. This statute goes beyond what is necessary for the protection of children. The Government has not proven otherwise. The affirmative defenses listed by the CPPA are illusory and offer a defendant little practical protection. This aspect was even noted by the Fifth Circuit. (App. 17, note 46) Further, the "appears to be a minor" standard in practical effect may lessen the prosecution's burden of proof that the age of a model depicted in a visual image is less than 18. These concerns involve the Due Process Clause as well as the First Amendment.

This Court as final arbiter of the Constitution should decide these matters of whether the law is invalid or not or whether the Ninth Circuit in *Free Speech* is correct or in error. This Court should grant certiorari.

3. The lower Federal Courts conflict over important constitutional and statutory questions concerning the Child Pornography Act.

A. Constitutional questions

Review is warranted because the constitutional ruling of the Ninth Circuit 198 F.3d at 1092 conflicts with the decisions of the First, Fourth, Eleventh and now Fifth

Circuit. All four circuits have upheld the constitutionality of the Act, rejecting identical First Amendment challenges.

B. Statutory questions

(1) The necessity of expert testimony to prove age of the minor.

This Court held that the age of the performers in a visual depiction is the crucial element separating legal innocence from wrongful conduct. *United States v. X-Citement Video*, 513 U.S. 64, 72-73 (1994). In this case, the Fifth Circuit held that expert testimony was not required regarding the age of the subjects depicted in the images. Appendix B. The Court of Appeals had previously held that expert testimony may well be necessary if the subject is post-puberty. *United States v. Katz*, 178 F.3d 368, 373 (5th Cir. 1999). However, the question must be determined on a case by case basis. Other lower federal courts have held that expert testimony was not so required. See *United States v. Villard*, 700 F. Supp. 803, 814 (D. N. J. 1988). In this case, many of the images where sexual conduct was obvious, involved young looking subjects, who could have well been 18 years of age or older. These subjects were obviously post-puberty. The few pictures which were probably pre-puberty involved nude children not sexual conduct. This Court's guidance on whether and when such expert testimony is required would greatly bear on whether Petitioner is entitled to a new trial, as such images were admitted into evidence.

(2) Lascivious Exhibition.

On appeal, Petitioner urged that the evidence was insufficient to sustain conviction. More specifically, Petitioner contended that the evidence was insufficient to show that (1) the age of the performers was under 18 and (2) lasciviousness. Court of Appeals Brief pp. 15-29. The statutory definition of child pornography requires "sexually explicit conduct" by a person under eighteen years of age. 18 U.S. Code § 2256(2). Among the listed conduct appears *"lascivious exhibition of the genitals or pubic area of any person."* § 2256(2)(E) (emphasis added). Congress did not expressly define "lascivious exhibition of the genitals or pubic area". One court has held that the depictions must consist of more than mere nudity; otherwise, inclusion of the term. would be meaningless. *United States v. Villard*, 885 F.2d 117, 121 (3rd Cir. 1989). Another court has developed six factors for the trier of fact to consider in determining "lasciviousness". *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd*, 812 F.2d 1239 (9th Cir. 1987). Still another circuit held that lasciviousness could be proven even in the absence of nudity. *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994). In this case, the district court did not instruct the jury using the *Dost* factors. In candor, Petitioner did not request such an instruction. Nevertheless, the lower court decisions leave the intent and meaning of the statute in a state of confusion. This statutory provision is commonly used in many, if not most, child pornography prosecutions. The statutory question begs guidance from this Court as a substantial risk exists that it will reoccur in the future. This question is sufficiently important to merit review.

4. This case presents questions of critical importance to the administration of Federal criminal justice.

As previously asserted, the question of what constitutes "lascivious exhibition" is a question of importance to the administration of Federal criminal justice. Many child pornography cases involve issues of lascivious exhibition to determine whether a minor was depicted engaging in sexual conduct. The question of what factors determine "lascivious exhibition" rightly belongs to this Court, not the lower federal courts. This Court may adopt the *Dost* factors, modify them or select an entirely different test. This court has granted certiorari to two cases involving federal child pornography convictions. *Jacobson v. United States*, 503 U.S. 540 (1992) and *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). The importance of child pornography litigation to the administration of Federal criminal justice cannot be doubted. Child pornography carries a unique social stigma which requires careful deliberation by the trier of fact. Many states require one convicted under federal child pornography laws to register as a sex offender. This court should ensure that the lower federal courts adopt sufficient safeguards in a child pornography prosecution to make certain that the accused receives a fair trial.

5. This case involves the proper construction and interpretation of federal statutes and the federal rules of evidence in conjunction with a federal statute which have not yet been but should be decided by this Court.

The proper construction of the federal rules of evidence in a federal criminal case presents an appropriate case for review. See e.g. *Old Chief v. United States*, 519 U.S. 172 (1997) (improper admission of prior conviction); Rule 402 prohibits admission of any irrelevant evidence. Fed. Rule Evid. 402. Rule 403 requires that the relative probative value of the evidence be balanced against its prejudicial risk of misuse. Fed. Rule Evid. 403.

The problem here is that most of the images shown to the jury who were post-puberty, and could have been 18 years or older. Those pictures which do show a prepubescent person show just mere nudity. Even though these issues involve an abuse of discretion standard of review, a controlling legal principle may hold that such discretion was abused. *Old Chief*, 519 U.S. at 191. In this case, the novel proposition is advanced whether a photograph or visual depiction should strictly comport with the statutory definition of "child pornography" 18 U.S. Code § 2256 before being admitted into evidence and presented to the jury. The district court should have determined that the visual depiction met the statutory requirements. The reason is that child pornography like child sexual abuse carries a unique stigma in society so this highly prejudicial evidence should carry a very high degree of probative value if admitted. *Frank v. County of Hudson*, 924 F. Supp. 62 (D. N. J. 1996). As a threshold matter, evidence is excludable under Rule 403 only if it is

"unfairly" prejudicial, in that it has "an undue tendency to suggest decision on an improper basis." Advisory Committee's Notes on Fed. Rule Evid. 403. Nevertheless, where the character of the evidence is such that it is likely to create so strong an impression in the minds of the jurors to the prejudice of the defendant, that they will be unable to cast it aside in the consideration of the case, a new trial should be ordered. The evidence was not only admitted wholesale; no balancing was performed by the district court. The images were admitted and then re-admitted for the purpose of a slide show. This visual display of "the parade of filth" was highly inflammatory and should have been excluded by the district court. *Douglass v. Hustler Magazine Inc.*, 769 F.2d 1128, 1142 (7th Cir. 1985) (admission of unrelated pornography held should have been excluded under Rule 403). The Fifth Circuit's ruling on this evidentiary matter conflicts with that of the Seventh Circuit in *Douglass* and should merit review aside from the novel issue presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Date: August 20, 2001

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-40034

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE ERVIN FOX, Jr.,

Defendant-Appellant.

Appeal from the United States District Court

for the Eastern District of Texas

April 13, 2001.

Before WIENER and STEWART, Circuit Judges, and SMITH,[1] District Judge.

WIENER, Circuit Judge:

In this Internet child pornography case, Defendant-Appellant George Ervin Fox, Jr. ("Fox") challenges on several grounds his conviction and sentencing pursuant to 18 U.S.C. § 2252A, which criminalizes the knowing receipt via computer of any visual depiction that is, "appears to be," or "conveys the impression of" a minor engaging in sexually explicit conduct. For the reasons

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[1] District Judge of the Western District of Texas, sitting by designation.

discussed below, we affirm both Fox's conviction and the sentence imposed by the district court.

I.

FACTS AND PROCEEDINGS

On the morning of July 11, 1997, Fox, who was employed by a private investigation firm, informed the owner, Keith McGraw, that he (Fox) had been working at the firm's computer ("the computer")[2] when suddenly pornographic images began to appear on the screen. Fox reported that he was instigating an investigation immediately to discover the source of the pornography. McGraw promptly informed the FBI about the incident.

Under questioning by the FBI, Fox admitted that he had received an e-mail the night before he reported the incident to McGraw from someone using the screen name "Opulot" who did not want to receive any more of "this stuff." In that email, Opulot stated that he or she had obtained the addressees' screen names and intended to forward them to the Internet provider, America Online, so that the addressees could be "put in jail."

Almost two years later, in March 1999, Fox gave a statement to another FBI agent that detailed a different account of how the pornography happened to be received on the computer. Although McGraw had been informed by Fox in 1997 that he was only investigating the source

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[2] Fox used the computer located in McGraw's office for Internet purposes. His own desktop computer at the firm was not connected to the Internet and was used primarily for word processing.

of pornography that had appeared mysteriously on the computer's screen, Fox admitted in the March 1999 statement to the FBI that he had "put his name on a list" to receive child pornography and subsequently began to receive and send such material. Fox insisted that he did so only as part of his own "investigation" into Internet child pornography, with the intention of turning over any "evidence" collected to the proper authorities.

Included in Fox's computer files were numerous pornographic images, 17 of which were later entered into evidence at his trial. Just three days before he initially informed McGraw about the appearance of child pornography on the computer, Fox had transmitted two of these images over the Internet, each of which depicts a young girl in a state of undress, one bearing the comment "Here's my 15-year-old-niece, Sky" and the other bearing the comment "Here's another of Poppy."

In May 1999, a grand jury returned an indictment against Fox charging him with one count of knowingly receiving child pornography via computer in violation of 18 U.S.C. § 2252A. This statute subjects to criminal penalties "any person who knowingly receives or distributes any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer[.]" The term "child pornography," in turn, is defined by 18 U.S.C. § 2256(8) as

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture . . . where (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is, *or appears*

> *to be*, of a minor engaging in sexually explicit conduct; (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct[.]

(emphasis added). Fox's motion to dismiss the indictment on the ground that § 2252A violates the First Amendment was denied by the district court. He was subsequently tried by a jury, which found him guilty of the charge alleged in the indictment.

In sentencing Fox, the district court determined that his failure to accept responsibility for his conduct, together with the fact that "when [Fox] would send some of the pornographic photographs to others, [he] intentionally portrayed these photographs to be of himself and/or his own children," warranted a sentence at the high end of the Sentencing Guideline range. Accordingly, Fox was sentenced to 46 months of confinement, ordered to pay a $5000 fine and a $100 special assessment, and assessed a term of supervised release of three years.

Fox now appeals to us, objecting to his conviction and sentence on grounds that (1) the statute under which he was convicted, 18 U.S.C. § 2252A, relies on a definition of "child pornography" that is overbroad and vague, in violation of the First Amendment, (2) the evidence is insufficient to sustain his conviction, (3) the district court abused its discretion in admitting into evidence copies of 17 of the images found in his computer files, (4) the

district court violated the *ex post facto* clause by imposing a sentence that exceeds the maximum assessable under the applicable Guideline in force at the time of the offense, (5) the district court erred by increasing his offense level for receiving material involving prepubescent minors without a sufficient evidentiary basis to support such an enhancement, and (6) the district court clearly erred in denying a reduction in his sentence for acceptance of responsibility.

II.

ANALYSIS

A. *Standard of Review*

We review the constitutionality of a federal statute *de novo*.[3] In reviewing a claim of insufficient evidence, we must determine whether, viewing the evidence in the light most favorable to the government, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.[4] We review the district court's evidentiary rulings for abuse of discretion.[5] The district court's interpretation of the Sentencing Guidelines is reviewed *de novo*, but its findings of fact and application of the Guidelines to the specific facts of the case are reviewed for clear error.[6] In addition, we review the district court's determination of acceptance of

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[3] *United States v. Jennings*, 195 F.3d 795, 800 (5th Cir. 1999).

[4] *United States v. Greer*, 137 F.3d 247, 249 (5th Cir. 1998).

[5] *United States v. Doggett*, 230 F.3d 160, 167 (5th Cir. 2000).

[6] *United States v. Lyckman*, 235 F.3d 234, 237 (5th Cir. 2000).

responsibility under the Guidelines with even more deference,[7] as the district court is in the best position to assess the defendant's acceptance of responsibility and "true remorse."[8]

B. *First Amendment*

Fox urges us to reverse his conviction on the ground that the statute under which he was convicted, 18 U.S.C. § 2252A (sometimes the "statute"), is unconstitutional because it prohibits speech protected by the First Amendment. The government counters that child pornography as defined in § 2256(8) is not constitutionally protected and accordingly may be regulated by the government even to the extent of banning such materials outright.

As an initial matter, Fox's contention that the power to regulate child pornography does not extend to prohibiting the mere possession of such materials was foreclosed by the Supreme Court over ten years ago in *Osborne v. Ohio*, which held that simply possessing and viewing child pornography can be constitutionally proscribed.[9] The more difficult question presented by this case is whether Congress can, without violating the First Amendment, *expand* the definition of child pornography

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[7] *United States v. Nguyen*, 190 F.3d 656, 659 (5th Cir. 1999).

[8] *United States v. Rodriguez*, 942 F.2d 899, 902-03 (5th Cir. 1991).

[9] 495 U.S. 103, 111 (1990); *see also United States v. Hilton*, 167 F.3d 61, 63 (1st Cir.1999)("[I]t is well-settled that child pornography, an unprotected category of expression identified by its content, may be freely regulated.").

to include images that only "appear to be" minors engaged in sexually explicit conduct. Although the First, Fourth, and Eleventh Circuits have rejected identical First Amendment challenges to the statute,[10] the Ninth Circuit has invalidated the statute on the ground that by criminalizing visual depictions that only "appear to be" or "convey the impression of" minors engaging in sexual conduct, the statute prohibits a type of expression protected under the Supreme Court's extant First Amendment jurisprudence.[11]

1. *Strict Scrutiny*

As a content-based restriction on speech,[12] § 2252A can only stand if it survives strict scrutiny, i.e., if the

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[10] *See United States v. Hilton*, 167 F.3d 61 (1st Cir.1999); *United States v. Mento*, 231 F.3d 912 (4th Cir.2000); *United States v. Acheson*, 195 F.3d 645 (11th Cir.1999).

[11] *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1092 (9th Cir.1999), *cert. granted sub nom. Ashcroft v. Free Speech Coalition*, No. 00-795, 121 S. Ct. 876, 69 U.S.LW 3382 (U.S. Jan. 22, 2001). We recognize that this circuit split will most likely be resolved by the Supreme Court when it hears and decides *Free Speech Coalition*, but as the Supreme Court will not do so until next term, and Fox has not asked us to postpone deciding his case until then, we reach and decide the issue of § 2252A's constitutionality.

[12] In his dissent to *Free Speech Coalition*, Judge Ferguson objects, *inter alia*, to analysis of the statute under the strict scrutiny framework, contending that "the Supreme Court's previous child pornography decisions . . . indicate that the proper mode of analysis is to weigh the state's interest in regulating child pornography against the material's limited social value." *See* 198 F.3d at 1101 (Ferguson, J., dissenting). As Fox's challenge to the statute is based on a claim that the very

statute has been narrowly tailored to advance a compelling governmental interest.[13] Notwithstanding the general rule that "[c]ontent-based regulations are presumptively invalid"[14] because of the intolerable "risk of suppressing protected expression," the Supreme Court has made clear that in regulating child pornography, Congress is entitled to "greater leeway."[15]

a. *Compelling Interest*

Bearing these principles in mind, we ask first whether the government advances a compelling interest by banning visual depictions that only "appear to be" or "convey the impression of" minors engaging in sexually explicit conduct. We begin with a brief overview of the history of the statutory language at issue in this case. In 1996, responding to the proliferation of computer-generated or "virtual" child pornography[16] and the resulting

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definition of child pornography employed by the statute is unconstitutionally expansive, however, we agree with every circuit that has considered this issue that strict scrutiny is the proper mode of analysis.

[13] *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878, 1886 (2000) (citation omitted).

[14] *See R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

[15] *See New York v. Ferber*, 458 U.S. 747, 756 (1982).

[16] For example, Congress found that computers and computer imaging technology can be used to "[1] produce . . . visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct . . . [2] alter sexually explicit photographs,

problems in enforcing federal child pornography statutes that required the government to prove that an actual minor had been used in the production of the pornography, Congress enacted the Child Pornography Prevention Act (the "CPPA") to amend 18 U.S.C. § 2251 *et seq.* The CPPA expanded the definition of child pornography to include visual depictions that "appear to be" or "convey the impression of" minors engaging in sexually explicit conduct.

In support of the CPPA, Congress offered the following justifications: (1) preventing the use of "virtual" child pornography to seduce children; (2) protecting *all* children from the harmful effects of child pornography, including the myriad minors not actually depicted or used in its production; (3) eliminating pornographic images that "whet the appetites" of pedophiles to abuse children sexually; (4) destroying the child pornography market, and (5) prosecutorial necessity.[17] Congress was particularly concerned that "[i]f the government must continue to prove beyond a reasonable doubt that mailed photos, smuggled magazines or videos, traded pictures, and computer images being transmitted on the Internet, are indeed actual depictions of an actual minor engaging [in] the sex portrayed, then there could be a built-in

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films, and videos in such a way as to make it virtually impossible . . . to determine if the offending material was produced using children . . . [and] [3] alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct [.]" S.Rep. No. 104-358, at 2 (1996).

[17] *See id.* at 12-20.

reasonable doubt argument in every child exploitation/pornography prosecution."[18]

In rejecting these justifications for § 2252A's ban on "virtual" child pornography, the Ninth Circuit reasoned that the landmark case of *New York v. Ferber*, in which the Supreme Court held that child pornography is not entitled to protection under the First Amendment,[19] the Court focused on only "the harm to the children *actually used* in the production of the materials."[20] Accordingly, the Ninth Circuit concluded that "[n]othing in *Ferber* can be said to justify the regulation of such materials other than the protection of the actual children used in the production of the materials."[21] The Ninth Circuit ultimately held that the compelling interest articulated by the government – the "devastating secondary effect that sexually explicit materials involving the images of children have on society, and on the well being of children"[22] – does not justify criminalizing the possession of such images "when no actual children are involved in the illicit images either by production or depiction."[23]

We respectfully disagree with the Ninth Circuit's determination that preventing harm to children actually depicted in pornography is the *only* legitimate justification for Congress's criminalizing the possession of child

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[18] *See id.* at 16 (internal quotation marks omitted).

[19] 458 U.S. 747, 764 (1982).

[20] *Free Speech Coalition*, 198 F.3d at 1092 (emphasis added).

[21] *Id.*

[22] *Id.* at 1091.

[23] *Id.* at 1095.

pornography. First, in *Osborne*, the Supreme Court expressly invoked not only the harm caused to minors actually used in the production of pornography but also the danger posed to children when such pornography is used to seduce or coerce them into sexual activity.[24] It makes little difference to the children coerced by such materials, or to the adult who employs them to lure children into sexual activity, whether the subjects depicted are actual children or computer simulations of children. As Congress found, "the danger to actual children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses [computer simulations] as when the material consists of unretouched images of actual children."[25]

Second, the *Ferber* Court expressly endorsed the destruction of the entire child pornography market as a justification for banning sexually explicit images of children.[26] Congress has found that, even when children are not exploited in the actual production of pornography, the "sexualization of minors creates an unwholesome environment which affects the psychological, mental, and emotional development of children and undermines the efforts of parents and families to encourage the sound

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[24] *See Osborne*, 495 U.S. at 111 ("the evidence suggests that pedophiles use child pornography to seduce other children into sexual activity").

[25] S. Rep. 104-358, at 18.

[26] *Ferber*, 458 U.S. at 760 (noting with approval that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for [child pornography]").

mental, moral, and emotional development of children[.]"[27] This finding comports with the Supreme Court's longstanding observation that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."[28] As it is beyond question that the government's interest in " 'safeguarding the physical and psychological well-being of a minor' is 'compelling,' "[29] we see no reason why such governmental interest in this regard is so attenuated as to limit the extent of its protection only to the youths actually appearing in child pornography.

In sum, we conclude that *Ferber* and *Osborne*, decided long before the specter of "virtual" child pornography appeared, in no way limit the government's interests in the area of child pornography to the prevention of only the harm suffered by the actual children who participate in the production of pornography. To the contrary, we agree with the Fourth Circuit that the government has an interest in "shielding *all* children from sexual exploitation resulting from child pornography,"[30] and that the government's interest in this regard is indeed compelling.

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[27] S. Rep. 104-358, at 2.

[28] *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

[29] *See Ferber*, 458 U.S. at 756-57 (*quoting Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

[30] *Mento*, 231 F.3d at 920.

b. *Narrow Tailoring*

To satisfy the exacting standards of strict scrutiny, a content-based restriction on speech such as § 2252A must not only advance a compelling governmental interest, but must also be narrowly tailored to attain that end.[31] We must determine, therefore, whether § 2252A's expansion of the definition of child pornography to include, in addition to sexually explicit images of actual children, images that only "appear to be" minors, is the least restrictive means of furthering the government's interests in combating the harms generated by child pornography.[32]

With respect to the government's interest in eradicating the market for child pornography as a whole, we are satisfied that such efforts "could be effectively frustrated if Congress were prevented from targeting sexually explicit material that 'appears to be' of real children."[33] Likewise, with respect to the government's interest in preventing the use of pornographic materials to coerce and even blackmail children into performing sexual acts, we have discussed earlier that sexually explicit images that only "appear to be" minors can, unfortunately, be just as effective in coercing children into sexual activity as images of actual children.

Perhaps most importantly, Congress has advanced a powerful new rationale for the necessity of the "appears

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[31] *See Playboy Entertainment Group*, 120 S.Ct. at 1886.

[32] *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

[33] *Hilton*, 167 F.3d at 73.

to be" language in § 2252A: the need to address the law enforcement problem created by tremendous advances in computer technology since *Ferber* and *Osborne* were decided, advances that have greatly exacerbated the already difficult prosecutorial burden of proving that an image is of a real child.[34] Without the "appears to be" language in the statute, "there is frequently a built-in reasonable-doubt argument as to the age of the participant, unless the government can identify the actual child involved."[35] During the trial in the instant case, for example, Special Agent Barkhausen, the government's computer expert, was forced to concede under cross-examination that "there's no way of actually knowing that the individual depicted [in the images] . . . even exists[.]" The "appears to be" language, then, is necessary to confront the enforcement problems that have been increased by these advancements in computer technology.

As further evidence of the statute's narrow tailoring, the government points to the statute's provision that makes an affirmative defense available to those who mail, transport, receive, sell, distribute or reproduce the materials if the person depicted actually was an adult at the time the image was created.[36] Although this defense is not available to those charged with mere possession, the statute does provide a different safe harbor for the individual possessor who can show that he (1) possessed fewer than three such images and (2) promptly and in

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[34] S. Rep. 104-358, at 16-17.

[35] *Mento*, 231 F.3d at 920.

[36] *See* 18 U.S.C. § 2252A(c).

good faith destroyed or reported the images to law enforcement.[37]

The statute's inclusion of these affirmative defenses, together with the prosecutorial necessity of the "appears to be" language and the nearly identical nature of the harms generated by both "real" and "virtual" child pornography, convince us that "the statutory language . . . cannot be improved upon while still achieving the compelling government purpose of banning child pornography."[38] Accordingly, we conclude that § 2252A is the least restrictive means of furthering the government's compelling interest in protecting the vulnerable young from the harms generated by child pornography.

We join with the First, Fourth, and Eleventh Circuits, then, in deciding that "it is a logical and permissible extension of the rationales of *Ferber* and *Osborne* to allow the regulation of sexual materials that appear to be of children but [do] not, in fact, involve the use of live children in their production."[39] As such materials are properly considered "child pornography," they are outside the protection of the First Amendment and may be freely regulated even to the extent of an outright ban. Accordingly, we hold that § 2252A's extension of the prohibition on child pornography to visual depictions that "appear to be" or "convey the impression of" minors engaging in sexually explicit conduct is fully consonant with the First Amendment.

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[37] *See* 18 U.S.C. § 2252A(d).

[38] *Mento*, 231 F.3d at 921.

[39] *Hilton*, 167 F.3d at 73.

2. *Overbreadth*

Our conclusion that "virtual" child pornography, like "real" child pornography, is not entitled to First Amendment protection does not end our inquiry into § 2252A's constitutionality. An otherwise constitutional statute may nonetheless violate the First Amendment if it is "overbroad," i.e., if it "criminalizes an intolerable range of constitutionally protected conduct."[40] Even so, we may not invalidate a statute unless its overbreadth is "*substantial* . . . in relation to the statute's plainly legitimate sweep."[41] We must remain mindful of the Supreme Court's admonition that the overbreadth doctrine is "strong medicine" which should be used "sparingly and only as a last resort."[42]

Fox's overbreadth challenge is best understood as a claim that, in addition to capturing unprotected conduct, the "appears to be" net of the statute scoops in a "substantial" by-catch of constitutionally protected conduct as well. Fox contends, for example, that if the persons depicted are not in fact minors, then the images comprise adult pornography and, as such, are entitled to protection under the First Amendment. In essence, "[i]t is the application of the statute to images of youthful-looking adult models"[43] that forms the gravamen of Fox's overbreadth challenge.

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[40] *See Osborne*, 495 U.S. at 112.

[41] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (emphasis added).

[42] *Id.* at 613.

[43] *Acheson*, 195 F.3d at 651.

We have already noted that the statute itself provides an affirmative defense available to those who mail, transport, receive, sell, distribute or reproduce sexually explicit materials if the person depicted actually was an adult at the time the images were created.[44] In addition, the government must prove in each instance that the defendant *knowingly* received sexually explicit depictions of minors or those who appear to be minors. Thus the statute's scienter requirement, which applies to the age of the persons depicted as well as to the nature of the materials, "limits the scope of the [statute] because the desire for prosecutorial efficiency dictates the vast majority of prosecutions . . . would involve images of prepubescent children or persons who otherwise clearly appear to be under the age of 18."[45] We also agree with the First Circuit that the danger of persons being convicted under § 2252A of possessing sexually explicit material of adults who look or dress in a youthful manner is "overstated" in light of Congress's determination that purveyors of child pornography "usually cater to pedophiles, who by definition have a predilection for prepubertal children."[46]

We acknowledge that the prosecution of individuals on the basis of sexually explicit depictions of youthful-

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[44] *See* 18 U.S.C. § 2252A(c).

[45] *Acheson*, 195 F.3d at 651-52 (internal quotation marks and citation omitted).

[46] *Hilton*, 167 F.3d at 73-74. In candor we must nevertheless recognize that, as this is an affirmative defense which places the burden of proving the models' majority on defendants who are virtually certain not to be able to track down producers and actors to adduce evidence of age, the defense is likely illusory.

looking adults is theoretically possible; however, the Supreme Court has made clear that "[e]ven where a statute at its margins infringes on protected expression, facial invalidation is inappropriate if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct."[47] Keeping in mind the Court's caveat that a statute's overbreadth must be "substantial . . . judged in relation to the statute's plainly legitimate sweep[,]"[48] we agree with the First Circuit that "[t]he existence of a few possibly impermissible applications of the [statute] does not warrant its condemnation."[49] Instead, whatever overbreadth may exist at the margins of § 2252A with respect to sexually explicit images of youthful-looking adults is "more appropriately cured through a more precise case-by-case evaluation of the facts in a given case."[50]

With respect to the troubling possibility of the statute's application to artistic expression otherwise fully protected under the First Amendment,[51] such as downloaded images of the famed erotic paintings of Balthus[52]

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[47] *Osborne*, 495 U.S. at 112 (internal quotation marks and citation omitted; ellipses in original).

[48] *See Broadrick*, 413 U.S. at 615.

[49] *Hilton*, 167 F.3d at 74.

[50] *Id.*

[51] Even though Fox does not claim that any of the materials for receipt of which he was convicted constitute such expression, he nevertheless has standing to challenge the statute on this ground as the Supreme Court has "altered its traditional rules of standing to permit – in the First Amendment area – attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite

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or stills from a film version of Nabokov's *Lolita*, we first recall that we must construe the statute, if at all possible, so as to avoid finding a constitutional violation.[53] Thus, we agree with the First Circuit's reasoning that Congress intended the "appears to be" language of the statute to target only those images that are " '*virtually indistinguishable* to unsuspecting viewers from *unretouched photographs* of actual children[,]' "[54] thereby placing "the vast majority of every day artistic expression [such as drawings, cartoons, sculptures, and paintings], even . . . speech involving sexual themes"[55] outside § 2252A's statutory reach.[56] Any imprecision that may remain at the margins

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narrow specificity." *See Broadrick*, 413 U.S. at 612 (internal quotation marks and citation omitted).

[52] Balthus, whom Miro called the greatest realist painter of his age, is known, among other things, for his erotically charged paintings of young girls. At his first one-man show in Paris in 1934, Balthus caused a stir with "Guitar Lesson," a painting of an older woman fondling a half-naked young girl, with a discarded guitar lying nearby.

[53] *Broadrick*, 413 U.S. at 613.

[54] *Hilton*, 167 F.3d at 72 (emphasis added) (*quoting* S.Rep. No. 104-358, at 7).

[55] *Hilton*, 167 F.3d at 72.

[56] We note that even though the government can only ban adult pornography when, "taken as a whole," the material lacks "serious literary, artistic, political or scientific value," *see Miller*

after employing this limiting construction – say, whether the statute would ban images akin to the work of renowned contemporary artist Chuck Close, whose ultra-realistic paintings can be indistinguishable from close-up photography – is more appropriately handled not by invalidating the statute but rather by " 'case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.' "[57]

In sum, we cannot agree with Fox that § 2252A "criminalizes an intolerable range of constitutionally protected conduct,"[58] particularly when we judge the extent of that overbreadth, as we must, in relation to the statute's "plainly legitimate sweep."[59] We hold that § 2252A is not unconstitutionally overbroad.

3. *Vagueness*

Fox also contends that the statute is void for vagueness. The Supreme Court has held that a statute is unconstitutionally vague if it does not "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement."[60] In other words, a statute is void for

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has crafted the statute to address, *see id.* at 775 (O'Connor, J., concurring), we do not believe this potential overbreadth to be sufficiently substantial to warrant invalidating the statute.

[57] *See Broadrick*, 413 U.S. at 615-16.

[58] *See Osborne*, 495 U.S. at 112.

[59] *See Broadrick*, 413 U.S. at 615.

[60] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

vagueness if it does not put the average reasonable person on notice of what conduct is prohibited.[61]

Fox nevertheless argues that § 2252A's "appears to be" language is "overly subjective" and thus creates "substantial uncertainty" for viewers because it may be difficult to distinguish between depictions of teenagers from those of young adults with even younger appearances.[62] The Ninth Circuit accepted a similar argument in *Free Speech Coalition* and held that the "appears to be" and "conveys the impression" language of the statute is unconstitutionally vague because both phrases are "highly subjective."[63] The Ninth Circuit was concerned that "the vagueness of the statute's key phrases regarding computer images permits enforcement in an arbitrary and discriminatory fashion."[64]

The First, Fourth, and Eleventh Circuits have reached the opposite conclusion. In *Hilton*, for example, the First Circuit concluded that the standard for interpreting the key language of the statute is not subjective, but objective: "A jury must decide, based on the totality of the circumstances, whether a reasonable unsuspecting viewer

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[61] *See Acheson*, 195 F.3d at 652.

[62] Fox's related contention that the term "lascivious" as used in the statute is similarly "subjective" was foreclosed by the Supreme Court in *United States v. X-Citement Video*, 513 U.S. 64, 78-79 (1994), which held that use of that term to define the prohibited material is constitutionally permissible.

[63] *Free Speech Coalition*, 198 F.3d at 1095.

[64] *Id.*

would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity."[65] We agree with the First Circuit's reasoning that together the scienter requirement of the statute and the affirmative defense available if the subject of the image was an adult at the time the image was produced[66] provide at least a modicum of additional safeguards against improper enforcement.[67]

Likewise, the Eleventh Circuit in *Acheson*, noting that "[s]exually explicit images falling close to the line separating adult pornography and unprotected child pornography are outside the most sensitive areas of speech vital to the free exposition of ideas,"[68] concluded that a reasonable person is on notice that possessing images appearing to be children engaged in sexually explicit conduct is illegal.[69] As for the argument that it is "impossible to tell whether an image 'appears to be' a minor," we agree with the Eleventh Circuit that "[t]he physical characteristics of the person depicted . . . go a long way toward determining whether the person appears to be a minor[;]" in addition, computer file names such as "Falcon 10" that, in the custom of the trade, reference the age of those depicted in the images "may even give some indication of the actual ages of the participants."[70] The *Acheson* court also noted that the safeguards against

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[65] *Hilton*, 167 F.3d at 75.

[66] *See* 18 U.S.C. § 2252A(a)(5)(B).

[67] *See Hilton*, 167 F.3d at 75.

[68] *Acheson*, 195 F.3d at 652.

[69] *Id.*

[70] *Id.* at 652-53.

improper enforcement provided by the statute, such as its scienter requirement and affirmative defense, "create an incentive for focusing prosecutorial energy on the heart of the child pornography problem – the pre-pubescent child pornography market."[71]

We are in accord with the line of analysis that emerges from the foregoing reasoning of the First, Fourth, and Eleventh Circuits, and conclude that, taken together, the statute's scienter requirement and affirmative defenses provide sufficient protection against improper prosecution to defeat Fox's vagueness challenge. In this vein, we also agree that the "appears to be" language is not so subjective as to fail to put reasonable persons on notice of what it is that the statute prohibits. Accordingly, we reject Fox's vagueness challenge to the statute.

C. *Sufficiency of the Evidence*

Having determined that the statute under which Fox was convicted passes constitutional muster, we must next assess his attack on the sufficiency of the evidence adduced by the government to convict him under that statute. Fox contends that the government's evidence is insufficient to (1) negate his "mistake of fact" defense, (2) satisfy the statute's *scienter* requirement, or (3) establish that the images in question were "lascivious" within the meaning of the statute.

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[71] *Id.* at 653.

1. *Mistake of Fact*

Fox argues that he is entitled to a "mistake of fact" defense by declaring that he was merely investigating Internet child pornography with a "good motive" – to "deliver up these defilers of children" to the proper authorities for well-deserved punishment. Recognizing that, standing alone, good motive is no defense,[72] Fox contends that the government has failed to prove beyond a reasonable doubt that he possessed the requisite scienter, which he glosses as "guilty mind." Fox, however, seriously mischaracterizes the statute's scienter element: The government must prove that the defendant *knowingly*, i.e., voluntarily and intentionally, received child pornography, not that he had some degree of *mens rea*. Here, Fox himself admitted in his March 1999 statement to the FBI that he had "put his name on a list" to receive child pornography and subsequently began to receive and send child pornography, all quintessential voluntary and intentional acts. As such, Fox's insistence that the government failed to prove that he knowingly received child pornography widely misses the mark.

Furthermore, the government correctly observes that Fox's "mistake of fact" defense is more accurately characterized as a "public authority" defense, which requires a defendant to show that he was engaged by a government official to participate in covert activity.[73] Fox presented

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[72] *United States v. Chenault*, 844 F.2d 1124, 1130 (5th Cir.1988).

[73] *See United States v. Spires*, 79 F.3d 464, 466 n.2 (5th Cir.1996).

no such evidence to the jury in this case, and so his claim that he is entitled to such a defense must fail.[74]

2. *Scienter*

Alternatively, Fox argues that even if he is not entitled to a "mistake of fact" or "public authority" defense, the evidence is nevertheless insufficient to prove beyond a reasonable doubt that he knew that the persons depicted in the images were younger than 18. This contention is baseless. As we have just noted, the jury heard evidence that Fox himself admitted to an FBI agent to having "put his name on a list" to receive *child* pornography. Fox cannot be heard to declare, on one hand, that he was conducting his own "investigation" into Internet child pornography and, on the other hand, that he did not know that the images he received and transmitted were of minors.

3. *Lasciviousness*

Finally, Fox objects that evidence presented to prove the "lasciviousness" of the images is insufficient. To repeat, Fox was convicted under 18 U.S.C. § 2252A, which subjects to criminal penalties "any person who knowingly receives or distributes any child pornography that has been mailed, or shipped or transported in interstate

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[74] *Cf United States v. Mathews*, 209 F.3d 338 (4th Cir.2000) (rejecting award-winning journalist's First-Amendment defense that he traded in child pornography for a "proper purpose," i.e., gathering information for an investigative report).

or foreign commerce by any means, including by computer[;]" and the term "child pornography," in turn, is defined as any visual depiction that "is, or appears to be, of a minor engaging in *sexually explicit* conduct[.]"[75] To carry its burden of proving that the conduct depicted is "sexually explicit," the government may demonstrate, *inter alia*, that the conduct involves the "*lascivious* exhibition of the genitals or pubic area of any person."[76]

In this circuit the six-factor test developed in *United States v. Dost*[77] is employed to determine whether an image is "lascivious."[78] Under *Dost*, we ask: (1) is the image's focal point the child's genitalia or pubic area, (2) is the setting depicted in the image sexually suggestive, (3) is the child depicted in an age-inappropriate pose or attire, (4) is the child partially clothed or nude, (5) does the image suggest sexual coyness or a willingness to engage in sexual activity, and (6) is the image intended or designed to elicit a sexual response in the viewer. An image need not produce affirmative answers to all of these questions to be considered "lascivious."[79] As even Fox concedes that at least seven of the 17 images shown to the jury possess "some" or "most" of the *Dost* factors, it is enough to say that the jury could easily have found at least one of the images to be "lascivious" within the

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[75] *See* 18 U.S.C. § 2256(8) (emphasis added).

[76] *See* 18 U.S.C. § 2256(2)(E) (emphasis added).

[77] 636 F. Supp. 828, 832 (S.D.Cal.1986), *aff'd* 812 F.2d 1239 (9th Cir.1987).

[78] *See United States v. Rubio*, 834 F.2d 442, 448 (5th Cir.1987).

[79] *See Dost*, 636 F. Supp. at 832.

meaning of the statute; and one is all that is required to support a verdict of guilty.

D. *Admission of the Photographs*

Fox proffers two related arguments regarding the admission of the photographic evidence. First, he advances that the district court abused its discretion in admitting "wholesale" the photographs of 17 of the images taken from his computer files without first requiring the government to make a preliminary showing by expert testimony that each of the photographs it sought to introduce depicts a minor or someone who appears to be a minor. Second, Fox contends that under Rule 403 of the Federal Rules of Evidence, the probative value of the photographs was substantially outweighed by the danger of unfair prejudice, in light of which, argues Fox, the photographs should not have been admitted.

1. *Lack of Expert Testimony*

Fox insists that the district court erred by admitting the photographs into evidence without requiring expert testimony as to the age of the persons depicted. In response, the government reminds us that in *United States v. Katz*, we held that whether the age of one depicted in child pornography can be determined by a lay jury without the assistance of expert testimony must be determined on a case-by-case basis.[80] Here, in addition to its own examination of the images, the jury was provided

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[80] 178 F.3d 368, 373 (5th Cir.1999).

with additional evidence in the form of an FBI agent's testimony about the common practice of including indications of the age of the subjects in the file names. In fact, two of the images bear Fox's own words describing the subject as "my 15-year-old niece."

As the government reiterates, the jury did not need to find that all 17 images presented at trial depict subjects under the age of 18; the jurors only needed to conclude that at least one of them, beyond a reasonable doubt, depicted a person who appeared to be less than the age of 18.[81] Inasmuch as even Fox concedes that "[s]ome of the photos appear to be prepubescent children who are . . . obviously less than 18," his challenge to his conviction on this basis fails. The district court did not abuse its discretion in admitting the photographs without expert testimony as to the subjects' ages.

2. *Unfair Prejudice*

Fox contends in the alternative that even if the photographs are held to be admissible without expert verification of age, their admission unfairly prejudiced him in violation of Federal Rule of Evidence 403.[82] Fox argues

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[81] The government also points out that in two of the images, the age of the models is immaterial because the images were "advertised, promoted, presented, described, [and] distributed" as those of minors, and thereby meet the statutory definition of child pornography. *See* 18 U.S.C. § 2256(8)(D).

[82] Rule 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

that the effect on the jury of introducing "irrelevant adult pornography" together with "relevant child pornography" was so "inflammatory" that it "painted him as a 'pervert.' " The government counters that the best evidence of whether the images are, in fact, "child pornography" is the images themselves, and that their admission, although certainly "prejudicial" to the defendant, was not *unfairly* so and was warranted by their relevance. Agreeing with this reasoning, we cannot say that Fox was unfairly prejudiced by the admission of the photographs. The district court did not abuse its discretion in admitting them.

E. *Ex Post Facto Violation*

Fox complains that the district court determined his sentence under a version of the applicable Sentencing Guideline that had been amended after the offense was committed but prior to sentencing. This, he argues, produced a sentence that violates the *ex post facto* clause of the Constitution.[83] Fox correctly states that if the application of the version of the Guideline in effect on the sentencing date rather than the version that had been in effect on the offense date results in a longer sentence or other disadvantage to the offender, the *ex post facto* clause is violated.[84] More specifically, Fox states that in determining his sentence the district court applied U.S.S.G. § 2G2.4, producing a substantial increase in the base level

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[83] *See* U.S. Const. art. I, § 9, cl. 3.

[84] *See United States v. Suarez*, 911 F.2d 1016, 1022 (1990).

of the offense, which in turn resulted in a significantly longer term of incarceration. We disagree.

Fox's presentence investigation report makes clear that, because his offense involved *receipt* (as opposed to *possession*) of child pornography, his sentence was determined using § 2G2.2, not § 2G2.4. Although the base offense level of § 2G2.4 was increased by an amendment adopted between Fox's commission of the offense and his sentencing, that section of the Guidelines has always cross-referenced § 2G2.2, the offense level of which has not changed since Fox committed the offense. Accordingly, Fox was not sentenced in violation of the *ex post facto* clause.

F. *Sentence Enhancement*

Relying again on the absence of expert testimony about the ages of the children in the photographs, Fox complains that there is insufficient evidence to support the district court's enhancement of his sentence on the basis of his knowing receipt of materials involving a prepubescent minor. The district court responded to this objection at Fox's sentencing hearing, stating that "there are in evidence a number of those pictures, and it's quite obvious in reviewing those that several were under the age of twelve, possibly the age of six or seven."

The government again emphasizes – correctly – that under U.S.S.G. § 2G2.2(b)(1), the presence of only one such image is sufficient support for the enhancement. Furthermore, to satisfy the Guideline's knowledge requirement with respect to the age of the persons

depicted, the government need only prove that Fox displayed reckless disregard for the ages of the subjects.[85] Applying this standard, we have no difficulty concluding that the district court's determination that at least one of the images received by Fox depicts a prepubescent minor is not clearly erroneous. The district court properly enhanced Fox's sentence on that basis.

G. *Refusal to Depart Downward*

Fox advances that even though he declined to make any comments concerning his involvement in the offense during his presentencing interview with the probation officer, his "eloquent" address to the district court at sentencing – in which he admitted his actions and "stood prepared to accept" his punishment – renders clearly erroneous the district court's refusal to reduce his sentence for acceptance of responsibility. Although the district court acknowledged the eloquence of Fox's statement, it nevertheless concluded that "from the onset of this case the defendant has failed to accept responsibility for his conduct. He has failed to acknowledge any wrongdoing and has blamed the FBI and others for his conviction." In like manner, the government reasons that Fox's denial of the essential factual elements of the offense at trial, together with his decision not to speak with the probation officer about his involvement in the offense, firmly support the district court's ruling.

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[85] *See United States v. Kimbrough*, 69 F.3d 723, 733 (5th Cir.1995) (citation omitted).

The sentencing court is best positioned to determine whether a defendant has displayed the requisite degree of remorse, contrition, and regret to merit a reduction in his sentence. We are unwilling to substitute our remote point of view for the district court's proximate determination that Fox was not entitled to a sentence reduction for acceptance of responsibility, based on his denial of guilt at trial and his refusal to speak with the probation officer before sentencing. Accordingly, we decline Fox's invitation to hold that the district court's refusal to reduce his sentence for acceptance of responsibility constitutes clear error.

III.

CONCLUSION

For the reasons explained above, Fox's conviction and sentence are

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

United States of America	§	
	§	No. 1:99 cr 75
vs.	§	
	§	
George Ervin Fox, Jr.	§	

Memorandum Opinion

(Filed Sept. 14, 1999)

I. Introduction

Defendant George Fox was charged with possessing child pornography in violation of section 2252A of the Child Pornography Prevention Act of 1996 ("the CPPA"). 18 U.S.C. § 2252A. The defendant asserts that the statute he is being prosecuted under is unconstitutional because it violates the First Amendment. For the reasons set forth below, the Court denies the defendant's motion to dismiss the indictment.

II. Background

Congress has passed several laws which attempt to combat the problems associated with child pornography. *See Am Library Ass'n v. Barr*, 956 F.2d 1178, 1181-85 (D.C. Cir. 1992) (discussing the history of the national anti-child pornography legislation). One of the most recent laws enacted by Congress is the CPPA. The CPPA was enacted to combat the use of computer technology to produce pornography that sends the impression that children were used in the photographs or images. In passing

the CPPA, Congress specifically recognized that computer technology is capable of "alter[ing] perfectly innocent pictures of children . . . to create visual depictions of those children engaging in any imaginable form of sexual conduct." S. Rep. No. 104-358, at 15 (1996). Congress decided that these "[c]omputer generated images which appear to depict minors engaging in sexually explicit conduct are just as dangerous to the well-being of . . . children as material using actual children. *Id.* at 19. Therefore, it is apparent that Congress passed the CPPA in an effort to prevent the effects computer generated images might have no children, even if no actual children are used in the images. *The Free Speech Coalition v. Reno*, No. C. 97-0281VSC, 1997 WL 487758 (N.D. Cal Aug 12, 1997).

Under 18 U.S.C. § 2256(8), child pornography is defined as:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where –
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. . . .

The CPPA also provides an affirmative defense for violations of the act if:

> (1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;
>
> (2) each such person was an adult at the time the material was produced; and
>
> (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2252A(c).

The defendant contends that the CPPA is overbroad and vague and thus unconstitutional. The defendant bases his argument primarily on § 2256(8)(B) where it states that it is illegal to possess a visual depiction if that visual image "is or appears to be [that], of a minor engaging in sexually explicit conduct." The defendant contends that this section of the statute "criminalizes constitutionally protected speech by banning depictions of adults who otherwise only appear to be minors." Def's. Mot. to Dismiss Indict. at 2.

III. The CPPA is Constitutional

In *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999), the First Circuit considered the exact same issues as are presented here. Relying on Supreme Court precedent, the First Circuit concluded that the CPPA is neither overbroad nor vague. *Id.* at 70-72. The First Circuit reasoned that it is constitutionally permissible for Congress "to allow the regulation of sexual materials that appear to be of children but did not, in fact, involve the use of live children in their production." *Id.* at 73.

This court does not find any flaws in the reasoning of the First Circuit. Accordingly, this court holds that the CPPA is neither overbroad nor vague.[1] Furthermore, the CPPA does not have a "chilling effect" on free speech as the defendant has contended. The defendant contends that § 2256(8)(B) criminalizes constitutionally protected free speech by banning depictions of adults who otherwise only appear to be minors. However, this argument ignores the affirmative defense provided in § 2252A(c). It is a defense to a charge under the CPPA if the alleged

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[1] Courts have consistently found other sections of the CPPA constitutional. *See, e.g. Connection Distrib. Co. v. Reno*, 154 F.3d 281 (6th Cir. 1998) (finding the record keeping portions of the act constitutional); *United States v. Hockings*, 129 F.3d 1069 (9th Cir. 1997) (finding no vagueness in the statute); *see also United States v. Stevens*, 29 F. Supp.2d 592 (D. Alaska 1998) (criticizing *United States v. Hilton*, 999 F. Supp. 131 (D. Me. 1998) which had found the CPPA overbroad and vague); *United States v. Lamb*, 945 F. Supp. 441 (N.D.N.Y. 1996) (holding that the definition of prohibited material under the Protection of Children Against Sexual Exploitation Act was not constitutionally vague).

child pornography is actually of an adult. 18 U.S.C. § 2252A(c)(1)-(3); *Free Speech*, at *5; *see also* S. Rep. at 21 (stating that the CPPA "does not, and is not intended to, apply to a depiction produced using adults engaging in sexually explicit conduct, even where a depicted individual may appear to be a minor"). Thus, the CPPA is constitutional.

IV. Conclusion

The Court concludes that § 2252A of the CPPA, and its incorporated definition of "child pornography" contained in § 2256(8)(B) are constitutionally valid. Accordingly, the Defendant's Motion to Dismiss the Indictment is hereby DENIED.

Signed this 15th day of September 1999.

/s/ Howell Cobb
Howell Cobb

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO.
VS.	§	1:99CR75(1)
GEORGE ERVIN FOX, JR.	§	JUDGE HOWELL COBB

ORDER

(Filed Sep. 13, 1999)

Came on to be considered the Motion of the Defendant herein to Dismiss the Indictment, and the Court after duly considering same finds that same should be and is hereby

_~~GRANTED~~.

✓DENIED.

DONE and SIGNED on this the 13th day of Sept., 1999.

/s/ Howell Cobb
HOWELL COBB
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40034

UNITED STATES OF AMERICA
Plaintiff – Appellee

v.

GEORGE ERVIN FOX, JR
Defendant – Appellant

Appeal from the United States District Court
for the Eastern District of Texas, Beaumont

ON PETITION FOR REHEARING

(Filed May 21, 2001)

Before WIENER and STEWART, Circuit Judges, and SMITH,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Weiner

* District Judge of the Western District of Texas, sitting by designation.

APPENDIX E

SEC. 121. This section may be cited as the "Child Pornography Prevention Act of 1996".

Subsection 1. Findings.

Congress finds that –

(1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved;

(2) where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;

(3) child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children "having fun" participating in such activity;

(4) child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children; such use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer;

(5) new photographic and computer imagining technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct;

(6) computers and computer imaging technology can be used to –

(A) alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals, or to determine if the offending material was produced using children;

(B) produce visual depictions of child sexual activity designed to satisfy the preferences of individual child molesters, pedophiles, and pornography collectors; and

(C) alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct;

(7) the creation or distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexually explicit conduct can haunt the minor for years to come;

(8) the effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, or on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is

the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children;

(9) the danger to children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses visual depictions of child sexual activity produced wholly or in part by electronic, mechanical, or other means, including by computer, as when the material consists of unretouched photographic images of actual children engaging in sexually explicit conduct;

(10)(A) the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children; and

(B) it inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials;

(11)(A) the sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them; and

(B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children;

(12) prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children; and

(13) the elimination of child pornography and the protection of children from sexual exploitation provide a compelling governmental interest for prohibiting the production, distribution, possession, sale, or viewing of visual depictions of children engaging in sexually explicit conduct, including both photographic images of actual children engaging in such conduct and depictions produced by computer or other means which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children engaging in such conduct.

Subsection 2. Definitions.

Section 2256 of title 18, United States Code, is amended –

(1) in paragraph (5), by inserting before the semicolon the following: ", and data stored on computer disk or by electronic means which is capable of conversion into a visual image";

(2) in paragraph (6), by striking "and";

(3) in paragraph (7), by striking the period and inserting a semicolon; and

(4) by adding at the end the following new paragraphs:

"(8) 'child pornography' means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where –

"(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

"(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

"(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

"(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct; and

"(9) 'identifiable minor' –

"(A) means a person –

"(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

"(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

"(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

"(B) shall not be construed to require proof of the actual identity of the identifiable minor.".

Subsection 3 Prohibited Activities Relating to Material Constituting or Containing Child Pornography.

(a) IN GENERAL. – Chapter 110 of title 18, United States Code, is amended by adding after section 2252 the following:

"§ 2252A. Certain activities relating to material constituting or containing child pornography

"(a) Any person who –

"(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

"(2) knowingly receives or distributes –

"(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

"(B) any material that contains child pornography that has been mailed,

or shipped or transported in interstate or foreign commerce by any means, including by computer;

"(3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;

"(4) either –

"(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

"(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

"(5) either –

"(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as

defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography; or

"(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer,

shall be punished as provided in subsection (b).

"(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter or chapter 109A, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

"(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such

person has a prior conviction under this chapter or chapter 109A, or under the laws of any State relating to the possession of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

"(c) It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), or (4) of subsection (a) that –

"(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;

"(2) each such person was an adult at the time the material was produced; and

"(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.".

APPENDIX F

A New School of Art Criticism: Child Pornography Prosecution

(c) 1998-1999 Davis Wright Tremaine, LLP

Elizabeth A. McNamara & Gregory A. Welch

Autumn 1998

Until recently, prosecutors have applied child pornography laws in a way that caused little concern for media companies, appropriately targeting those who trafficked in an underground market of videotapes and photographs of children that specifically catered to pedophiliac tastes. The past year, however, has seen a disturbing new phenomenon: prosecutors applying the statutes to serious artistic works with broad public appeal.

In one widely publicized case, the authorities in Oklahoma City seized all copies of the Academy Award-winning movie *The Tin Drum* from local video stores, and, only after the seizure, sought a judicial declaration that the film is child pornography.[1] In Alabama and Tennessee, grand juries actually indicted the bookstore chain Barnes & Noble in cases involving fine art photographs of nude children taken by Sally Mann, Jock Sturges and David Hamilton. Finally, in the wake of a recent federal statute aimed at computer-generated child pornography,[2] concern that the new film version of *Lolita* might be a tempting target for a similar prosecution left the movie without a U.S. distributor for over a year.

Although attempts to suppress artistic works as child pornography still remain isolated incidents, they nevertheless pose a substantial challenge to businesses that

produce, market or sell products that include even non-explicit depictions of child or adolescent sexuality. Most statutes proscribing child pornography use broad, expansive language that is designed to avoid providing inadvertent loopholes to imaginative child pornographers. Thus, a prosecutor pushing a moral agenda can find in even the most celebrated film arguable "depictions" or "representations" of "simulated" sexual conduct or "lewd and lascivious displays" of nudity, the standard phrases for conduct prohibited under these statutes. Such broad categories of prohibited conduct – often left statutorily undefined – increase the risk that an artistic work could fall within the literal scope of a statute (albeit unconstitutionally). This risk is made greater by significant variations among the many state and federal child pornography statutes.

The State of the Law

Existing caselaw interpreting child pornography statutes does not provide a well-developed constitutional defense for material that has serious literary, artistic, political or social value. Undoubtedly, the reason for this is that courts considering constitutional challenges have only done so where the specific material at issue was indisputably child pornography. Under these circumstances, it is not surprising that courts have been unsympathetic to arguments that child pornography statutes might reach protected artistic works.

The extent to which courts should consider artistic and other values when determining whether material constitutes proscribable child pornography is an issue left

somewhat unsettled by the Supreme Court's seminal decision in *Ferber v. New York*.[3] The Ferber Court established that states have greater leeway to prohibit child pornography than adult pornography, which cannot be proscribed unless obscene under the standard set forth in *Miller v. California*.[4] Finding the *Miller* standard inadequate to protect children, the Court "adjusted" the standard and permitted states to prohibit child pornography without requiring that the work be considered as a whole, appeal to the prurient interest of an average person, or portray sexual conduct in a patently offensive way.[5] However, the Court stopped short of eliminating the requirement that the material lack serious literary, artistic, political or social value. Faced with a film "devoted almost exclusively to depicting young boys masturbating," the Court opined that very little material depicting children having sex would be worthy of constitutional protection, and that courts could safely deal with such works on a case-by-case basis.[6]

Because serious works like *The Tin Drum* and the photographs at issue in the Barnes & Noble cases have never been prosecuted as child pornography before, courts simply have not had occasion to discuss the scope of First Amendment protections for visual depictions of non-explicit sexual conduct by minors. Although *The Tin Drum* case was recently resolved on statutory grounds, and the Barnes & Noble cases may come to a similar conclusion, given the absence of authority in this area, these cases may still provide some guidance on the constitutional questions.

The Tin Drum Case

In the summer of 1997, the district attorney in Oklahoma City belatedly filed a declaratory judgment action seeking a ruling that *The Tin Drum* was child pornography – after he and other state officials found themselves defendants in a federal civil rights action based on the confiscation of *The Tin Drum* by police. Spurred by complaints from a local anti-pornography group, the police obtained an ex parte, oral "advisory" opinion from a state judge that the film contained illegal child pornography. Armed with this oral opinion – but no order, warrant or subpoena – the police seized all known copies of the film.

And what in the film – widely available for almost two decades – prompted this extraordinary action? The two-and-a-half hour film, which won both the Academy Award for Best Foreign Language Film and the Palme D'Or at Cannes in 1979, is a bizarre allegorical fantasy that chronicles the horrific rise of Nazism in Central Europe through the eyes of a boy named Oskar, who resolves to stop growing at the age of three out of fear and distrust of the world around him. Towards the end of the film, a series of scenes portrays Oskar's sexual awakening, as he finds himself attracted to the family's young housekeeper. While these scenes touch on sexual themes, they contain no actual sexual conduct or even nudity. And one of the scenes at issue only involves Oskar fleetingly witnessing sexual conduct by two consenting adults.[7] Nevertheless, the district attorney claimed that the scenes violate Oklahoma's child pornography statutes[8] because they constitute a "representation, depiction or description" of the young Oskar in sexual situations. Under the statute, even representations of "simulated"

sexual conduct are prohibited, and the district attorney argued that this language reaches the non-explicit scenes in *The Tin Drum*.[9] The district attorney also vigorously argued that a statutory exemption for "bona fide objects of art" did not apply to the child pornography provisions.

On October 20, 1998, the federal district court in the Western District of Oklahoma found that *The Tin Drum* does not violate the state's child pornography statute. As a matter of statutory construction, the court held that the "bona fide objects of art" exemption applies to child pornography cases. The court acknowledged *The Tin Drum's* clear artistic merit and therefore granted Blockbuster's motion for summary judgment. Because the court based its decision on statutory construction, it did not directly address the parties' constitutional arguments. However, the court did provide some helpful analysis by noting that Oklahoma's statutory exemption for artistic works was consistent with *Ferber's* instruction that child pornography statutes "must be applied on a case-by-case basis with a proper concern also to avoid suppressing serious literary or artistic expression." The court's observation clarifies that under *Ferber* (which concerned a statute that had no exemption for artistic works) artistic merit is clearly a relevant consideration for courts applying state statutes.

Because the court resolved *The Tin Drum* case by applying a statutory exemption for artistic works, it did not consider whether potentially overbroad language in the statute should be given an appropriate limiting construction. Nor did the court address the constitutional limits on construing the "representation" or "portrayal" of sexual conduct to encompass dramatic acting in films

involving no actual sex. The court did suggest, however, that the scenes fell within the statute's broad proscription of material in which minors are "portrayed, depicted or represented" as engaging in sexual conduct, even though no actual sexual conduct or nudity occurred. In an opinion clearly informed by the view that the prosecutor overreached in his attempt to enjoin *The Tin Drum* as child pornography, this acknowledgement should nonetheless give practitioners pause. After *The Tin Drum*, the extent to which states may prohibit mere "portrayals," as well as other constitutional issues, remain open questions.

The Barnes & Noble Cases

The Barnes & Noble cases may provide an occasion to further develop the "as applied" defense in the child pornography context. The photographs at issue depict nude and partially-clad children. Although prosecutors in Tennessee are no longer pursuing the misdemeanor charges against Barnes & Noble, the bookseller still faces two felony child pornography prosecutions in Alabama. At the heart of the Barnes & Noble prosecution is whether the photographs constitute a "lewd" display of genitals or female breasts by minors. The children in the photographs are not depicted as engaging in sexual activity of any kind. Courts have rejected previous constitutional challenges that "lewd" (or "lascivious") is unconstitutionally vague. In doing so, courts developed a list of relevant factors to consider in determining whether a display is "lewd," including whether the focus of the photograph is the child's genitalia or breasts; whether the photograph's setting and the child's pose, attire, and

expression are sexually suggestive; and whether the photograph is intended or designed to elicit a sexual response in the viewer.[10] There is little precedent for applying these factors in the context of artistic works that deal with emerging sexuality in children and adolescents.

Finally, like the newly construed Oklahoma statute but unlike many child pornography statutes, the Alabama statute includes an express "lack of serious artistic value" standard as part of the definition of child pornography.[11] Thus, as in *The Tin Drum* litigation, the Alabama court will not need to reach the *Ferber* issue of whether the First Amendment requires artistic value to be considered. Nevertheless, because of the dearth of cases discussing artistic merit in the child pornography context, a thoughtful analysis of the interplay between artistic value and subject matter by the court could still have a wide and beneficial impact.

Lolita and The Child Pornography Prevention Act of 1996

The federal enactment of the Child Pornography Prevention Act of 1996 ("CPPA")[12] has further complicated this area. This law expands the definition of child pornography to include visual depictions (including simulations) that give the appearance of a minor engaged in sexually explicit conduct. Congress enacted the law to criminalize computer-generated child pornography, which can be created from innocuous images of children or from adult pornography through the use of computer graphics technology, a process called "morphing."

The CPPA was immediately challenged as unconstitutional in federal courts in the Northern District of California and the District of Maine.[13] Both courts found that the law was a constitutionally permissible content-neutral regulation, but they disagreed about whether the law was unconstitutionally vague and overbroad. While the Northern District of California upheld the statute, the District of Maine struck it down – but in making the constitutional ruling both courts focused on the ambiguity of the phrase "appears to be a minor" and the potential for that language to reach adult pornography that employed young looking adults. Again, because the plaintiffs in these cases seem primarily interested in arguments to protect adult pornography, neither court found it necessary to focus on the extent to which the statute could be constitutionally applied to artistic works that include arguable "simulated" sexual activity. Yet, the California court did express general skepticism that artistic works would be proscribed by the CPPA.

With the decided lack of clarity in the area, the CPPA had an immediate effect on the new film version of *Lolita*, directed by Adrian Lyne. *Lolita* was almost completed when the CPPA was enacted. Like *The Tin Drum*, *Lolita* contains no explicit sexual conduct by an underage actor. However, to meet the narrative demands of the film – which is, after all, a story about a pedophile's sexual relationship with a young girl – the director had hired an adult body double to perform scenes involving nudity. After the passage of the new law – apparently concerned that the film might fall within the literal scope of the statute – news reports reveal that the film's producers

hired a lawyer to supervise additional editing with particular attention to the specifications of the CPPA. Despite these efforts, the film was unable to get a distributor in the United States for over a year. Finally, Showtime obtained the rights to premiere *Lolita* in the United States on its cable channel, where it ran in August without legal incident.

Despite the filmmakers' concerns over the CPPA, no prosecutor has yet threatened *Lolita* with child pornography charges, leaving *The Tin Drum* and the Barnes & Noble cases as the only recent examples of child pornography charges against artistic works. However, without clear guidance from the courts on the First Amendment protection for such works, they are unlikely to be the last.

Endnotes

CHILD PORNOGRAPHY

1 The authors and Robert D. Balin, also in the New York office of Davis Wright Tremaine, are representing Blockbuster Videos, Inc. in this declaratory judgment action.

2 Pub. L. 104-208, 110 Stat. 3009 (codified as 18 U.S.C. §§ 2251, 2252, 2252A, 2256).

3 458 U.S. 747 (1982).

4 413 U.S. 15 (1973). A work is obscene under the *Miller* standard if (1) the work, taken as a whole, appeals to the prurient interest in sex; (2) the work portrays sexual conduct in a patently offensive way; and (3) the work, taken as a whole, does not have serious literary, artistic, political or scientific value.

5 458 U.S. at 764.

6 *Id.* at 752, 773-74.

7 The Oklahoma statute also prohibits depictions of a minor as a "portrayed observer" of sexual conduct. Okla. Stat. tit. 21, § 1024.1.

8 *Id.* at §§ 1021-1024.4.

9 If the scenes at issue in the *Tin Drum* are deemed child pornography, scores of mainstream films also could fall prey to prosecutorial attacks. Even such acclaimed films as *Prince of Tides* or *Bastard Out of Carolina* – which depict scenes of child abuse – could technically be said to fall within the proscriptions of child pornography statutes.

10 *See United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir.) *cert. denied*, 484 U.S. 856 (1987).

11 Ala. Code § 13A-12-190.

12 Pub.L. 104-208, 110 Stat. 3009 (codified at 18 U.S.C. §§ 2251, 2252, 2252A, 2256).

13 *Free Speech Coalition v. Reno*, 1997 WL 487758, 25 Media L. Rep. 2305 (N.D. Cal. 1997); *United States v. Hilton*, 999 F. Supp. 131 (D. Maine 1998).

APPENDIX G

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.